

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LAMONS GASKET COMPANY,  
A DIVISION OF TRIMAS  
CORPORATION,

Employer,

and

MICHAEL E. LOPEZ,

Petitioner,

and

UNITED STEEL, PAPER AND  
FORESTRY, RUBBER,  
MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND  
SERVICES WORKERS'  
INTERNATIONAL UNION,

Union.

Case 16 RD-1597

**BRIEF OF AMICUS CURIAE**  
**COALITION FOR A DEMOCRATIC WORKPLACE**  
**AND ORGANIZATIONS LISTED INSIDE COVER**  
**IN SUPPORT OF EMPLOYER**

PETER N. KIRSANOW  
Benesch, Friedlander, Coplan & Aronoff LLP  
200 Public Square, Suite 2300  
Cleveland, Ohio 44114  
Telephone: (216) 363-4500  
Facsimile: (216) 363-4588  
Email: pkirsanow@beneschlaw.com

*Attorneys for Amicus Curiae*  
*Coalition for a Democratic Workplace*

## **List of Amici**

### *82 National Associations*

Aeronautical Repair Station Association  
American Apparel & Footwear Association  
American Bakers Association  
American Concrete Pressure Pipe Association  
American Council of Engineering Companies  
American Fire Sprinkler Association  
American Foundry Society  
American Health Care Association  
American Hotel and Lodging Association  
American Meat Institute  
American Pipeline Contractors Association  
American Rental Association  
American Seniors Housing Association  
American Trucking Association  
Assisted Living Federation of America  
Associated Builders and Contractors, Inc.  
Associated Equipment Distributors  
Associated General Contractors of America  
Automotive Aftermarket Industry Association  
Brick Industry Association  
Building Owners and Managers Association International  
Cement Employers Association  
Center for Individual Freedom  
Chamber of Commerce of the United States\*  
College and University Professional Association for Human Resources  
Consumer Electronics Association  
Custom Electronic Design & Installation Association  
Food Marketing Institute  
Forging Industry Association  
Healthcare Distribution Management Association  
Heating, Airconditioning & Refrigeration Distributors International  
Independent Electrical Contractors, Inc.  
Industrial Fasteners Institute  
International Association of Refrigerated Warehouses  
International Council of Shopping Centers  
International Foodservice Distributors Association  
International Franchise Association  
International Sign Association  
International Warehouse Logistics Association  
Kitchen Cabinet Manufacturers Association  
NASSTRAC, Inc.  
National Apartment Association  
National Association of Chemical Distributors  
National Association of Home Builders

National Association of Manufacturers\*  
 National Association of Mutual Insurance Companies  
 National Association of Wholesaler-Distributors  
 National Center for Assisted Living  
 National Club Association  
 National Council of Chain Restaurants  
 National Council of Farmer Cooperatives  
 National Council of Textile Organizations  
 National Federation of Independent Business\*  
 National Grocers Association  
 National Lumber and Building Material Dealers Association  
 National Multi Housing Council  
 National Petrochemical and Refiners Association  
 National Ready Mixed Concrete Association  
 National Restaurant Association\*  
 National Retail Federation  
 National Roofing Contractors Association  
 National Small Business Association  
 National Stone, Sand & Gravel Association  
 National Systems Contractors Association  
 National Tank Truck Carriers  
 National Utility Contractors Association  
 North American Die Casting Association  
 North American Equipment Dealers Association  
 Petroleum Marketers Association of America  
 Retail Industry Leaders Association  
 Small Business and Entrepreneurship Council  
 Snack Food Association  
 Society for Human Resource Management\*  
 SPI: The Plastics Industry Trade Association  
 Textile Care Allied Trades Association  
 Textile Rental Services Association  
 Tooling and Manufacturing Association  
 Transportation Intermediaries Association  
 Truck Renting and Leasing Association  
 United Fresh Produce Association  
 United Motorcoach Association  
 Western Growers Association

146 State and Local Associations

Arizona Builders' Alliance  
 Associated Builders and Contractors Alabama Chapter  
 Associated Builders and Contractors Central Florida Chapter  
 Associated Builders and Contractors Central Pennsylvania Chapter  
 Associated Builders and Contractors Central Ohio Chapter  
 Associated Builders and Contractors Chesapeake Shores Chapter  
 Associated Builders and Contractors Connecticut Chapter

Associated Builders and Contractors Cornhusker Chapter  
Associated Builders and Contractors Delaware Chapter  
Associated Builders and Contractors Eastern Pennsylvania Chapter  
Associated Builders and Contractors Empire State Chapter  
Associated Builders and Contractors Florida Gulf Coast Chapter  
Associated Builders and Contractors Golden Gate Chapter  
Associated Builders and Contractors Heart of America Chapter  
Associated Builders and Contractors Illinois Chapter  
Associated Builders and Contractors Indiana Chapter  
Associated Builders and Contractors Inland Pacific Chapter  
Associated Builders and Contractors Iowa Chapter  
Associated Builders and Contractors Kentuckiana Chapter  
Associated Builders and Contractors Keystone Chapter  
Associated Builders and Contractors Maine Chapter  
Associated Builders and Contractors Massachusetts Chapter  
Associated Builders and Contractors Mid-Tennessee Chapter  
Associated Builders and Contractors Mississippi Chapter  
Associated Builders and Contractors Nevada Chapter  
Associated Builders and Contractors New Mexico Chapter  
Associated Builders and Contractors of California  
Associated Builders and Contractors of Michigan  
Associated Builders and Contractors Pacific Northwest Chapter  
Associated Builders and Contractors Pelican Chapter  
Associated Builders and Contractors Rhode Island Chapter  
Associated Builders and Contractors Rocky Mountain Chapter  
Associated Builders and Contractors Saginaw Valley Chapter  
Associated Builders and Contractors San Diego Chapter  
Associated Builders and Contractors Southeastern Michigan Chapter  
Associated Builders and Contractors Southeast Pennsylvania Chapter  
Associated Builders and Contractors TEXO Chapter  
Associated Builders and Contractors Virginia Chapter  
Associated Builders and Contractors Western Colorado Chapter  
Associated Builders and Contractors Western Washington Chapter  
Associated Industries of Massachusetts  
California Restaurant Association  
CenTex Chapter IEC  
Central Alabama Chapter IEC  
Central Indiana IEC  
Central Missouri IEC  
Central Ohio AEC/IEC  
Central Pennsylvania Chapter IEC  
Central Washington IEC  
Centre County IEC  
Charleston Metro Chamber of Commerce  
Colorado Association of Commerce and Industry  
Colorado Concern  
Colorado Restaurant Association

East Tennessee IEC  
Eastern Washington Chapter, IEC  
Greater Columbia Chamber of Commerce  
Greater Montana IEC  
Florida Restaurant and Lodging Association  
Foundry Association of Michigan  
IEC Atlanta Chapter  
IEC Chesapeake  
IEC Dakotas, Inc.  
IEC Dallas Chapter  
IEC Florida West Coast  
IEC Fort Worth/Tarrant County  
IEC Georgia Chapter  
IEC Greater St. Louis  
IEC Hampton Roads Chapter  
IEC National  
IEC NCAEC  
IEC New England  
IEC of Arkansas  
IEC of East Texas  
IEC of Greater Cincinnati  
IEC of Idaho  
IEC of Illinois  
IEC of Kansas City  
IEC of Northwest Pennsylvania  
IEC of Oregon  
IEC of Southeast Missouri  
IEC of Texoma  
IEC of the Bluegrass  
IEC of the Texas Panhandle  
IEC of Utah  
IEC Southern Arizona  
IEC Southern Colorado Chapter  
IEC Southern Indiana Chapter-Evansville  
IEC Texas Gulf Coast Chapter  
IEC Western Reserve Chapter  
IEC, Inc. El Paso Chapter  
IEC, Inc. Lubbock Chapter  
IEC, Inc. San Antonio Chapter  
IEC, South Florida Chapter, Inc.  
IECA Kentucky & S Indiana Chapter  
IECA of Arizona  
IECA of Nashville  
IECA of Southern California, Inc.  
IEC-OKC, Inc.  
Indiana Cast Metals Association  
Iowa Restaurant Association

Kansas Chamber  
Kansas Restaurant & Hospitality Association  
Little Rock Chamber  
Louisiana Restaurant Association  
MEC IEC of Dayton  
Mid-Oregon Chapter IEC  
Mid-South Chapter IEC  
Midwest IEC  
Minnesota Trucking Association  
Montana Chamber of Commerce  
Montana IEC  
Nebraska Chamber of Commerce & Industry  
Nebraska Restaurant Association  
Nevada Restaurant Association  
New Hampshire Lodging & Restaurant Association  
New England IEC  
New Jersey IEC  
New Jersey Motor Truck Association  
North Carolina Restaurant and Lodging Association  
Northern New Mexico IEC  
Northern Ohio ECA  
North Las Vegas Chamber of Commerce  
NW Washington IEC  
Ohio Cast Metals Association  
Ohio Restaurant Association  
Oregon Restaurant & Lodging Association  
Pennsylvania Foundry Association  
Pennsylvania Restaurant Association  
Puget Sound Washington Chapter  
Rio Grande Valley IEC, Inc.  
Rocky Mountain Chapter IEC  
South Carolina Hospitality Association  
South Dakota Retailers Association  
Southern New Mexico IEC  
State Chamber of Oklahoma  
Texas Cast Metal Association  
Texas Restaurant Association  
Texas State IEC  
Tri State IEC  
Virginia Trucking Association  
Western Colorado IEC  
West Virginia Chamber  
Wichita Chapter IEC  
Wisconsin Cast Metals Association  
Wisconsin Restaurant Association

*\* These organizations have filed separate amicus briefs in this case. They also have joined this brief as members of CDW and support the arguments herein.*

## TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES .....	8
II.	INTEREST OF AMICUS CURIAE .....	1
III.	ISSUE PRESENTED .....	1
IV.	SUMMARY OF ARGUMENT .....	2
V.	ARGUMENT .....	4
	A. The Right of Employees to Make a Free Choice Concerning Representation Must Not be Subordinated to the Promotion of Labor Stability.....	4
	1. Employee free choice is the essential predicate to labor stability. ....	4
	2. A secret ballot election conducted by the National Labor Relations Board is the best method for determining employees' freely chosen collective bargaining representative.....	6
	B. Voluntary recognition pursuant to neutrality/card check agreements should not be accorded bar status equal to that of Board-conducted elections. ....	8
	C. The <i>Dana</i> policy is a rational modification of the <i>Keller Plastics Eastern</i> voluntary recognition bar that recognizes the realities of contemporary industrial relations. ....	11
	D. No compelling reason has emerged since issuance of <i>Dana</i> to justify modifying or overturning the decision.....	14
VI.	CONCLUSION.....	16

## **I. TABLE OF AUTHORITIES**

### **Cases**

<i>American Beauty Baking Co.</i> , 198 NLRB 327 (1972).....	9
<i>Auciello Iron Works v. NLRB</i> , 517 U.S. 781 (1996).....	2
<i>City Welding &amp; Mfg. Co.</i> , 191 NLRB 124 (1971).....	9
<i>Columbia Broadcasting System</i> , 125 NLRB 1161 (1959).....	11
<i>Cooper-Hewitt Elec. Co.</i> , 162 NLRB 1148 (1967) .....	9
<i>Dana Corp.</i> , 351 NLRB 434 (2007) .....	1
<i>Diamond Walnut Growers v. NLRB</i> , 113 F.3d 1259 (D.C. Cir. 1997).....	12
<i>Evergreen Health Care, Inc. v. NLRB</i> , 104 F.3d 867 (6 <sup>th</sup> Cir. 1997) .....	9
<i>Food Lion v. United Food and Commercial Food Workers Int'l Union</i> , 103 F.2d 1007 (D.C. Cir. 1997) .....	12
<i>Holiday Inn of Perrysburg</i> , 243 NLRB 280 (1979) enf'd in part, den. in part, 647 F.2d 692 (6 <sup>th</sup> Cir. 1981) .....	10
<i>Imco Container Co.</i> , 148 NLRB 312 (1964) .....	11
<i>J.P. Stevens &amp; Co.</i> , 244 NLRB 407 (1979), enf'd 668 F.2d 767 (4 <sup>th</sup> Cir. 1982).....	10
<i>Keller Plastics Eastern, Inc.</i> , 157 NLRB 583 (1966) .....	1
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527, 532 (1992) .....	5
<i>Levitz Furniture Co. of the Pacific, Inc.</i> , 333 NLRB 717 (2001).....	6
<i>Lylie Mfg. Co.</i> , 170 NLRB 991 (1968), enf'd, 417 F.2d 192 (10 <sup>th</sup> Cir. 1969).....	9
<i>Merrill Axle &amp; Wheel Service</i> , 158 NLRB 1113 (1966).....	9
<i>MV Transportation</i> , 337 NLRB 770 (2002) .....	5
<i>NLRB v. Gissel Packing Co.</i> , 365 U.S. 575, 602 (1969) .....	8
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) .....	6
<i>NLRB v. Randall P. Kane, Inc. d/b/a The Catalyst</i> , 581 F.2d 215 (9 <sup>th</sup> Cir. 1978).....	11
<i>NLRB v. Sanford Home For Adults</i> , 669 F.2d 35 (2d Cir. 1981).....	9
<i>NLRB v. Savair Mfg. Co.</i> , 414 U.S. 270 (1973) .....	10
<i>Pattern Makers League v. NLRB</i> , 472 U.S. 95, 102-03 (1985).....	5
<i>Ray Brooks v. NLRB</i> , 348 U.S. 96 (1954).....	6
<i>Republic Corp.</i> , 260 NLRB 486 (1982); <i>Dresser Industries, Inc.</i> , 248 NLRB 33 (1980).....	11
<i>Rowand Co., Inc.</i> , 210 NLRB 95 (1974) .....	9
<i>Skyline Distributors v. NLRB</i> , 99 F.3d 403 (D.C. Cir. 1996) .....	5
<i>Stride Rite Corp.</i> , 228 NLRB 383 (1977); <i>American Can Co.</i> , 157 NLRB 167 (1966).....	11
<i>Underground Services Alert of Southern California</i> , 315 NLRB 958 (1994).....	6

### **Statutes**

29 USC § 157.....	4
-------------------	---



## **II. INTEREST OF AMICUS CURIAE**

The Coalition for a Democratic Workplace (the “Coalition”) is an amalgam of hundreds of employer associations and other organizations. The membership of the Coalition represents millions of businesses of all sizes from every industry sector in every region of the country. The diverse employers represented by the Coalition have substantive experience with card check campaigns and voluntary recognition agreements, as well as elections conducted by the National Labor Relations Board (“Board”).

As representatives of employers governed under the National Labor Relations Act (“Act”), members of the Coalition have a profound interest in national labor policy in general and interpretation of the Act specifically.

## **III. ISSUE PRESENTED**

On August 27, 2010 the Board issued an order in the instant case granting review of the Regional Director’s Decision and Direction of Election, stating that substantial issues concerning voluntary recognition had been raised arising out of the Board’s decision in *Dana Corp.*, 351 NLRB 434 (2007).

Prior to *Dana*, an employer’s voluntary recognition of a union based upon a majority card showing created an immediate bar to any election petition for a “reasonable period of time” in order to permit the employer and union to negotiate a collective bargaining agreement. The “reasonable period of time” had no definite span, but could have been as long as one year. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). A collective bargaining agreement executed by the parties during the bar period would establish a “contract bar” that would prevent any challenge to the union’s representational status for up to three years’ of the agreement’s term. *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996).

In *Dana*, the Board held that a bar does not immediately attach upon voluntary recognition pursuant to card check. Rather, a bar is established *after* 1) employees in the bargaining unit receive notice of the recognition; 2) such notice advises the unit employees of their right to file a decertification petition (or support the petition of a rival union) within 45 days of the notice; and 3) the 45 day period elapses without the filing of a petition.

The Board modified the 40 year-old voluntary recognition bar because of a labor relations landscape that had changed substantially since the bar's establishment: the use of recognition agreements had significantly increased, Board-conducted secret ballot elections had significantly declined, yet Board elections remained superior to card check in determining a union's representational status.

Accordingly, the Coalition respectfully submits that the issue presented before the Board is whether there has been a substantial change in union and/or business practices between *Dana's* issuance in 2007 and the present that warrants modifying or overturning the voluntary recognition bar policy set forth in such decision.

#### **IV. SUMMARY OF ARGUMENT**

The undersigned Coalition respectfully submits that the voluntary recognition election bar standards set forth in the Board's decision in *Dana Corp*, 351 NLRB 434 (2007) must be maintained. The factual rationale in support of the decision remains unchanged. No new circumstances whatsoever have arisen since *Dana's* issuance that justify modifying or overturning the decision.

The *Dana* policy supports labor stability without sacrificing employee free choice. The policy recognizes the primacy of the Board's election process as the preferred method of determining employees' representational preference.

Employee free choice is the indispensable predicate to true labor stability. Although the Board and courts have long acknowledged that voluntary recognition of a union by employees pursuant to a card check campaign is a legitimate exercise of employees' representational choice, a Board-conducted secret ballot election remains the best method for determining employees' representational preference.

The reasons for the superiority of the secret ballot election to card check are numerous. As opposed to card check, a Board-conducted election provides *all* employees, not just a strategically select cohort, with notice of both the election and their rights related thereto. Employees informed of their rights and the pendency of the election have an opportunity to gather facts, debate the merits of union representation with other bargaining unit members and ask questions of both the union and the employer.

Furthermore, in a Board-conducted election the integrity of the selection process is preserved by the Board's policing of both the conduct of the parties and the campaign, thus greatly limiting the opportunity for threats and intimidation. The polling place is kept free from electioneering. Most importantly, the secret ballot permits the employee to make a fundamentally private choice in private, free from pressure or coercion.

The safeguards that attend a Board-conducted election are wholly absent during a card check campaign. The employee's choice is made not in private but in public. Occasions for threats, coercion, peer pressure and manipulation abound.

Since the integrity of a card check choice cannot equal that of a Board-conducted election, the respective election bars that attach should not be accorded the same status – particularly given the increased usage of card check relative to Board elections. The voluntary recognition bar standards set forth in *Dana* properly and rationally mediate the difference between card check and secret ballot: *Dana* does not eliminate the voluntary recognition election

bar; instead, it reasonably defers its attachment for 45 days to allow employees, if they so choose, to have a secret ballot election.

The workplace developments that supported *Dana's* modification of the previous voluntary recognition bar proceed unabated. The number of Board elections continue to plummet and unions show no signs of abandoning card check. Conversely, no new facts or judicial decisions have emerged that justify overturning *Dana*.

*Dana* reasonably promotes both employee free choice and labor stability. Its voluntary recognition bar should remain undisturbed.

## **V. ARGUMENT**

### **A. The Right of Employees to Make a Free Choice Concerning Representation Must Not be Subordinated to the Promotion of Labor Stability.**

#### **1. Employee free choice is the essential predicate to labor stability.**

The primary argument of opponents of the voluntary recognition bar policy enunciated in *Dana* is that such policy derogates labor stability. No direct empirical evidence supports that argument. Nothing in the Act supports that argument. On the contrary, the Act's very operational structure recognizes that labor stability depends on the ability of employees to freely choose a collective bargaining representative in a manner devoid of pressure or coercion.

Section 7 makes no reference whatsoever to labor stability. Rather, Section 7 sets forth the rights of employees to form and join labor organizations or choose not to do so and to bargain collectively through representatives of their own choosing. 29 USC § 157. Section 7 makes absolutely no reference to the role of the employer in this regard. Section 7 makes absolutely no reference to the right of unions in this regard. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). Section 7 does not make the rights of employees subordinate to labor stability.

In fact, the principal charge of the Board is to protect employee rights, not union or employer rights. *Id.*

The right of employees to freely choose their collective bargaining representative or no representative is paramount to achieving labor stability in the workplace. Indeed, employee free choice is a necessary predicate to labor stability. Labor stability cannot be achieved where the Act's fundamental principle of voluntary unionism is eroded or compromised. See *Pattern Makers League v. NLRB*, 472 U.S. 95, 102-03 (1985); *Skyline Distributors v. NLRB*, 99 F.3d 403 (D.C. Cir. 1996).

The Board's decision in *Dana* recognizes that the attachment of a voluntary recognition bar pursuant to a neutrality/card check agreement executed by the employer and the union—parties nowhere identified in Section 7—without employee recourse to the Board's election process could deprive employees of the right to freely choose a collective bargaining representative through the best mechanism available.

The interest of labor stability without true employee free choice is counterfeit. True labor stability derives its essence from the accurate and unfettered selection by the employees of a collective bargaining representative to represent their interests. Cf. *MV Transportation*, 337 NLRB 770 (2002). The greater the uncertainty regarding the accuracy or legitimacy of such selection, the greater the uncertainty regarding the stability of the collective bargaining relationship between the employer and the union. Thus, by providing a mechanism to reduce the uncertainty regarding the accuracy and legitimacy of the selection, the voluntary recognition bar policy articulated in *Dana* promotes both employee free choice *and* labor stability.

**2. A secret ballot election conducted by the National Labor Relations Board is the best method for determining employees' freely chosen collective bargaining representative.**

The United States Supreme Court, federal courts of appeal, and the Board have consistently recognized the Board-conducted secret ballot election as the preferred and most reliable means of determining majority support. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). See also, *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001); *Underground Services Alert of Southern California*, 315 NLRB 958 (1994).

The reasons for the preference are manifold. A Board-conducted election contains myriad safeguards to ensure that employees' representational preferences are reliably captured. Among other things, in a Board-conducted election all employees are notified of their rights prior to the election. Thus, all employees, as opposed to just those strategically selected by a union organizer, have an opportunity to register their preferences.

Having been placed on notice, employees have ample opportunity to gather facts to assist in making their representational determination. They can discuss the pros and cons of representation with the union, the employer and other employees. They have time to deliberate over the information collected before making this ultimate decision.

Moreover, once placed on notice that an election campaign is underway, affected employees are better positioned to protect their rights to make a choice free of threats or coercion by filing unfair labor practice charges should any of those rights be infringed. And if either the union or employer engages in objectionable conduct, another election may be conducted. Employer misconduct of sufficient gravity may even dictate imposition of a bargaining order.

The campaign preceding a Board-conducted election also provides numerous benefits to employee free choice. Employees are more likely to make a deliberate, informed choice after

hearing about all of the alleged benefits and detriments of union membership. In contrast, during a card check campaign, employees are likely to hear only one side of the story.

Furthermore, the Board goes to considerable lengths to ensure that “laboratory conditions” prevail during the election process, ensuring that the choice registered by voters is free of coercion and undue influence. Neutral Board agents ensure that the election is free of taint or corruption. Ballot boxes are inspected and electioneering near the polls is prohibited. Observers selected by the employer and union verify the eligibility of voters.

Of course, the most important feature of a Board-conducted election is the secret ballot. The secret ballot is the hallmark of employee free choice, insulating the voter from threats, coercion and peer pressure. The ballot boxes are inspected and sealed by Board agents. The Board agents tally the ballots in the presence of representatives of the employer and union. In the end, no one but the individual employee knows how he voted.

The Board and courts are not alone in recognizing that the multiple safeguards of a Board election render it superior to any other means of gauging employee representational preference. In August 2001, Representative George Miller (D-CA.) authored a letter to Mexican officials following a labor dispute in that country, stating “[W]e feel that the secret ballot election is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.” Letter from U.S. Rep. George Miller (D-CA.) to Junta Local De Conciliacion y Arbitraje del Estado de Puebla, August 28, 2001 (emphasis added). Fifteen other members of Congress signed Congressman Miller’s letter.

Organized labor also acknowledges the superiority of the secret ballot. In a brief filed with the Board in *Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc.*, the AFL-CIO quoted the Supreme Court’s statement in *NLRB v. Gissel Packing Co.*, 365 U.S. 575, 602 (1969) that a representational election

“is a solemn . . . occasion, conducted under safeguards to voluntary choice . . . [whereas] other means of decision-making are not comparable to the privacy and independence of the voting booth.”

*Dana* gives employees the ability to utilize the superior process of the secret ball of election to test the accuracy and validity of card check voluntary recognition. It does so without eliminating the election bar, thus promoting both free choice and labor stability.

**B. Voluntary recognition pursuant to neutrality/card check agreements should not be accorded bar status equal to that of Board-conducted elections.**

Section 9(a) of the Act states that a representative “designated or selected” by a majority of employees in a unit shall be the exclusive bargaining representative. Although Section 9(a) itself does not specify how such representative should be “designated or selected,” the Board and courts have recognized that an employer may voluntarily recognize a union that has demonstrated majority support by means other than an election, i.e. by presentment of authorization cards signed by a majority of employees in the bargaining unit.

Nonetheless, there can be no doubt that card check is inferior to a Board-conducted election for reliably determining majority support. Authorization cards simply lack the unalloyed integrity of a Board-conducted election for registering employees’ representational preferences. The safeguards that pertain in a Board-conducted election set forth in Section V(A) (2) above are absent in the card solicitation process. Employees routinely are solicited to sign cards in the presence of co-workers and union representatives. Such occasions are ripe for threats, coercion, peer pressure and/or undue influence. Consequently, there is no guarantee that an employee’s signature on a card is a true and free exercise of his Section 7 rights. See, e.g., *Evergreen Health Care, Inc. v. NLRB*, 104 F.3d 867 (6<sup>th</sup> Cir. 1997); *NLRB v. Sanford Home For Adults*, 669 F.2d 35 (2d Cir. 1981); *Lylie Mfg. Co.*, 170 NLRB 991 (1968), enf’d, 417 F.2d 192 (10<sup>th</sup> Cir. 1969); See also *Rowand Co., Inc.*, 210 NLRB 95 (1974); *American Beauty Baking Co.*,



198 NLRB 327 (1972); *City Welding & Mfg. Co.*, 191 NLRB 124 (1971); *Cooper-Hewitt Elec. Co.*, 162 NLRB 1148 (1967); *Merrill Axle & Wheel Service*, 158 NLRB 1113 (1966).

Yet the unreliability of union authorization cards is not merely a function of possible threats and coercion. The Supreme Court has noted that the card check's deficiencies are inherent in the very nature of the card check campaign:

The unreliability of cards is not dependent on the possible use of threats . . . It is inherent as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.

*Gissel*, *supra* 602 n.20.

The card solicitation process can occur over protracted periods during which employee sentiment concerning representation can fluctuate. As a result it is often unclear whether majority support actually exists at the time the union requests recognition.

Employees may be subject to pro-union appeals before and during the card solicitation process. Typically, no opposing viewpoints are conveyed. Consequently, employees are not making a fully-informed choice regarding representation. Moreover, the absence of neutral Board supervision during the card solicitation process is an invitation to manipulation, misrepresentation and even forgery. See, e.g., *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *Holiday Inn of Perrysburg*, 243 NLRB 280 (1979) *enf'd* in part, *den. in part*, 647 F.2d 692 (6<sup>th</sup> Cir. 1981); *J.P. Stevens & Co.*, 244 NLRB 407 (1979), *enf'd* 668 F.2d 767 (4<sup>th</sup> Cir. 1982); *NLRB v. Randall P. Kane, Inc. d/b/a The Catalyst*, 581 F.2d 215 (9<sup>th</sup> Cir. 1978); See also *Republic Corp.*, 260 NLRB 486 (1982); *Dresser Industries, Inc.*, 248 NLRB 33 (1980); *Stride Rite Corp.*, 228 NLRB 383 (1977); *American Can Co.*, 157 NLRB 167 (1966); *Imco Container Co.*, 148 NLRB 312 (1964); *Columbia Broadcasting System*, 125 NLRB 1161 (1959). The Board, in contrast, goes to great lengths to ensure that elections are conducted in secrecy, the

ballots are protected from tampering and the individual voting is both identifiable and eligible. None of these protections is available during the card check process.

The fact that so few procedural safeguards accompany the card solicitation process is less problematic where the employer insists on an election at the conclusion of such process, but where the employer extends voluntary recognition, any defects in the card campaign are imported into the voluntary recognition and must necessarily taint the legitimacy of the union's representational status. Quite simply, it is an administrative fiction to assert that voluntary recognition pursuant to card check is of the same quality as a Board-conducted election.

The taint is compounded by the fact that in many cases the "voluntary" recognition is anything but. Card check campaigns have proliferated in tandem with corporate campaigns that often compel employers to recognize unions in something other than a sober, deliberative manner consistent with the best interests of employees, employers and the workplace.

Corporate campaigns encompass a spectrum of union actions designed to pressure an employer to deal with the union. The campaign may include tactics such as administrative actions, filing charges against the employer with various agencies such as Occupational Safety and Health Administration, Environmental Protection Agency or Securities and Exchange Commission, litigation, resort to political pressure, harassment of company shareholders and officers, and public disparagement. See e.g. *Food Lion v. United Food and Commercial Food Workers Int'l Union*, 103 F.2d 1007 (D.C. Cir. 1997); *Diamond Walnut Growers v. NLRB*, 113 F.3d 1259 (D.C. Cir. 1997).

An employer often executes a neutrality/card check agreement to avoid the damage these pressure tactics may cause to its business. In doing so, the employer abandons the backstop of a Board-conducted secret ballot election, leaving the representational determination to the infirmities of a card check campaign.

While the inferiority of a card check campaign in adducing majority support does not preclude voluntary recognition under the current prevailing interpretation of the Act, such recognition should not be accorded the same bar status as a Board-conducted election. Again, the reason is simple. Equating bar status achieved pursuant to voluntary recognition and that achieved pursuant to a Board-conducted election is a woefully imprecise administrative construct.

An election bar attaches immediately after a Board-conducted election because there is absolutely no doubt of the majority status of the union. The rigorous safeguards of the Board-conducted election procedure make sure of it. Such majority status deserves bar protection to preserve and promote the collective bargaining relationship and enhance labor stability.

Granting the same bar status to voluntary recognition based on authorization cards is a discretionary administrative rationalization untethered to the realities of the card check campaign. This does not mean that the flaws in the card check procedures require that the union should not be recognized. Nor does it mean that no bar whatsoever should attach. It simply means that the nature of the voluntary recognition bar should reflect the uncertainties inherent in the card check process. This is particularly important given the proliferation of neutrality/card check agreements since *Keller Plastics Eastern* was decided in 1966. *Dana* reasonably accommodates these uncertainties while maintaining the voluntary recognition bar.

C. **The *Dana* policy is a rational modification of the *Keller Plastics Eastern* voluntary recognition bar that recognizes the realities of contemporary industrial relations.**

The current *Dana* voluntary recognition bar standard is a rational modification of the *Keller Plastics Eastern* bar standard. *Dana* recognized the profound policy implications of the proliferation of neutrality/card check agreements in conjunction with the precipitous decline in Board-conducted elections over the last decade: hundreds of thousands of employees are being

deprived of the ability to register their representational preferences by the preferred means of the secret ballot.

The trajectory of Board elections reflected in the chart below demonstrates that the “preferred method” of ascertaining union support might soon become an anachronism:

<b>Year</b>	<b>Total number of elections for union representation</b>	<b>Number of elections won in favor of union representation</b>	<b>Total number of employees eligible to vote for union representation</b>	<b>Number of employees involved in elections won by unions</b>
<b>1997</b>	3,261	1,656	224,262	90,333
<b>1998</b>	3,296	1,711	227,116	97,661
<b>1999</b>	3,012	1,576	234,182	108,420
<b>2000</b>	2,896	1,513	210,757	87,907
<b>2001</b>	2,571	1,395	203,616	77,884
<b>2002</b>	2,675	1,506	175,885	79,065
<b>2003</b>	2,352	1,340	155,070	75,661
<b>2004</b>	2,293	1,312	159,461	77,450
<b>2005</b>	2,099	1,248	141,467	68,638
<b>2006</b>	1,650	988	113,480	60,137
<b>2007</b>	1,510	890	95,916	52,365
<b>2008</b>	1,588	1,028	110,903	71,791
<b>2009</b>	1,304	864	69,832	44,033
<b>Total, 1997 to 2009</b>	30,507	17,027	2,121,947	991,345
<b>Total change from 1997 to 2009</b>	-1957	-792	-154,430	-46,300
<b>Percent change from 1997 to 2009</b>	-60.0	-47.8	-68.9	-51.3

U.S. Bureau of Labor  
Statistics, October, 2010

In contrast, the volume of requests for voluntary recognition shows no signs of abating. As noted in the dissent to the Order Granting Review in the instant case, the regional offices received 1,111 requests for voluntary recognition notices in the 31 months from the issuance of the General Counsel’s Memorandum regarding implementation of *Dana* to January 1, 2010.

Office of General Counsel Memorandum, OM O8-07, (Oct. 22, 2007). This represents an average of approximately 420 requests per year. Given the labor movement's expressed intent to resort increasingly to card check, it is likely that this number will grow. Accordingly, it is probable that at some point in the near future, more employees will select their respective collective bargaining representatives by means of card check than by a Board-conducted secret ballot election; more employees will be represented by a union for which employees did not vote under laboratory conditions—free from pressure, coercion and manipulation. But for *Dana*, many of these employees would never even have the opportunity to cast a secret ballot in exercise of their Section 7 rights.

*Dana* gives appropriate balance to both card check voluntary recognition and the secret ballot. It does not eliminate voluntary recognition nor the continued vitality thereof. *Dana* merely provides a reasonable mechanism to test the integrity of voluntary recognition without disrupting the stability of the nascent collective bargaining relationship.

*Dana*'s 45 day notice period provides a narrow but necessary window for employees to test the majority status of a voluntarily recognized union. The tolling of the recognition bar during this period does nothing to impair labor stability. Nothing prevents the union and employer from bargaining during this period—except, that is, for tradition: it is not uncommon for little substantive bargaining to occur in the first six weeks after certification of a union; and any negotiations that do occur consist mainly of “shape of the bargaining table” discussions, or, at best, discussions about non-economic items.

The number of petitions filed post-*Dana* confirm that *Dana* was not a radical departure from Board doctrine. The 1,111 requests for voluntary recognition received by the Board produced 85 election petitions resulting in 54 elections. Employees voted against the voluntarily recognized union 15 times. In other words, in 1,026 of 1,111 instances of voluntary recognition,

a recognition bar attached shortly after recognition without any meaningful impairment to labor stability.

Of greater significance is the fact that in 15 instances employees used the secret ballot to reject a voluntarily recognized union—a union that manifestly did not represent a majority of employees at the time recognition was extended. *Dana* gave these employees the ability to determine their representational preferences with all of the protections afforded by a Board election. Had *Dana* not issued, the voluntary recognition bar would have attached immediately, saddling the majority of employees in the unit with a union not of their choosing, and perhaps even a contract not to their liking.

*Dana*'s measured approach provided recourse to the employees in those 15 elections consistent with the Board's approach to an employer *withdrawal* of recognition in *Levitz*. There, the Board held that just as an employer may lawfully recognize a union without an election based on proof of actual majority support, it may also withdraw support without an election based on proof of actual loss of such support. After such withdrawal of recognition, 30% or more of the bargaining unit can petition for a Board election to test the validity of the withdrawal. Thus, both *Dana* and *Levitz* provide reasonable but essential mechanisms for verifying employees' representational preference.

**D. No compelling reason has emerged since issuance of *Dana* to justify modifying or overturning the decision.**

Significant changes in Board law are a function of Supreme Court (and in some cases, circuit court) decisions, substantial changes in workplace practices or changes to the Board majority.

*Dana* was issued because of a dramatic shift in workplace practices, i.e., the increase in card check recognition and decrease of Board-conducted elections. Since issuance of *Dana*,

however, neither the Supreme Court nor circuit courts have issued any pertinent decisions and there have been no relevant changes in workplace practices. Therefore, any modification or overturning of *Dana* would represent a change in Board policy without any substantive or legal rationale for such change. On the contrary, the changing factual circumstances that drove the decision in *Dana* continue to evolve in a direction supporting the decision and militate against reverting back to the *Keller Plastics Eastern* standard. As reflected in the chart in Section C above, the number of secret ballot elections continues to march rapidly southward. Meanwhile, there is no evidence that unions have abandoned neutrality/card check agreements or recognition proceeding therefrom.

Obversely, there is no evidence that *Dana* has roiled labor stability. There has been no appreciable aggregate increase in refusal to bargain charges filed against employers since 2007 and the total number of charges filed against employees has remained relatively static in the last three years. See Seventy Second Annual Report of the National Labor Relations Board (2007); Seventy Third Annual Report of the National Labor Relations Board (2008); Seventy Fourth Annual Report of the National Labor Relations Board (2009).

There is no credible data showing an increase in surface bargaining by employers or a refusal to engage in negotiations during the *Dana* 45 day window period. Moreover, a literature review produces no reliable studies showing an increase in dilatory bargaining tactics by employers in order to “run-out the clock” on *Dana*’s voluntary recognition bar.

Similarly, a literature review fails to yield reliable studies that *Dana*’s window period has resulted in fewer first contracts between employers and voluntarily recognized unions. And there is no empirical evidence that *Dana* has increased employer reluctance to execute neutrality/card check agreements or to voluntarily recognize a union pursuant to such agreements.

Moreover, any *Dana*-induced disruption to labor stability cannot be proven by strike data. Major work stoppages continue their decades-long decline. Twenty-one major strikes idling 189,000 workers took place the year *Dana* issued. In 2009 there were only five strikes idling 13,000. Bureau of Labor Statistics, News Release Feb. 17, 2010. Obviously, these statistics, that do not include “minor” work stoppages, fail to prove that *Dana* had no effect on labor stability. But they certainly do not prove that *Dana promoted* labor instability.

Ironically, a return to the pre-*Dana* standard would disrupt the very labor stability that critics of *Dana* maintain should be the Board’s paramount concern. A rejection of *Dana* barely three years from its issuance would whipsaw unions and employers who had conformed their practices and expectations to the *Dana* standard. Such a change would be vastly different from a judicious calibration of long-standing precedent in response to a rapidly changing labor relations environment. Requiring labor and management to adapt to incremental modifications in Board law driven by facts is more readily justifiable than abrupt reversals driven by changes in Board composition.

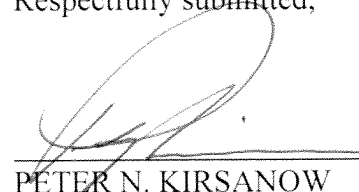
## **VI. CONCLUSION**

The voluntary recognition bar doctrine set forth in *Dana* effectively balances the interests of employee free choice and labor stability in an era where voluntary recognition pursuant to card check is in the ascendancy relative to Board-conducted secret ballot elections. No substantial changes in workplace practices have occurred since *Dana*’s issuance that justify modifying or overturning its standards. Indeed, the *continued* increase in neutrality/card check agreements coupled with the pronounced decline in Board elections over the past three years make maintenance of *Dana*’s standards more imperative today than on the date of its issuance.



For the foregoing reasons, the Coalition respectfully submits that *Dana's* voluntary recognition bar policy should not be modified or overturned.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'PK', is written over a horizontal line.

PETER N. KIRSANOW  
Benesch, Friedlander, Coplan  
& Aronoff LLP  
200 Public Square, Suite 2300  
Cleveland, Ohio 44114  
Telephone: (216) 363-4500  
Facsimile: (216) 363-4588  
Email: pkirsanow@beneschlaw.com

*Counsel for Coalition for a Democratic  
Workplace*

**CERTIFICATE OF SERVICE**

A copy of the foregoing Brief of Amicus Curiae Coalition For A Democratic Workplace was sent this 1<sup>st</sup> day of November, 2010 by overnight delivery to:

Lamons Gasket  
Bill Alsup, Plant Manager  
7300 Airport Blvd.  
Houston, TX 77061

Barnes & Thornburg LLP  
Keith E. White, Esq.  
00 One Summit Square  
Fort Wayne, IN 46802

Michael Lopez  
14015 Merry Meadow  
Houston, TX 77049

National Right to Work  
Legal Defense Fund  
Glenn M. Taubman, Esq.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160

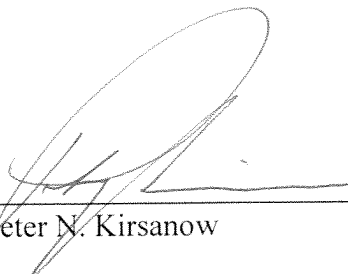
United Steelworkers AFL-CIO-CLC  
Richard J. Brean, Esq.  
General Counsel  
Five Gateway Center, Suite 807  
Pittsburgh, PA 15222

Steelworkers AFL-CIO-CLC  
Brad Manzolillo, Esq.  
5 Gateway Center  
USWA Organizing Department  
Room 913  
Pittsburgh, PA 15222

NLRB Region 16 – Ft. Worth  
819 Taylor Street, Room 8A24  
Fort Worth, TX 76102-6178

And a copy has been filed electronically and by overnight delivery with:

Lester Heltzer  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N.W.  
Washington, D.C. 20570

  
\_\_\_\_\_  
Peter N. Kirsanow